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In two months, a daily record of working hours. For all and sundry?

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The obligation to ensure a daily record of working hours creates difficulties in sectors, business activities and occupations that require a worker's normal and overtime working hours to be tracked over longer periods of time. Employment legislation itself had chosen to annualise the calculation of working hours so as to allow greater flexibility in the matter. Now it is necessary to find the right balance between the monitoring of working time and the flexibility of a productive organization.

1. Royal Decree-Law 8/2019, of 8 March, on urgent measures for social protection and against precarious work in the working day (Official Journal of Spain, 12 March), aside from introducing numerous measures of a social nature, has included an amendment to employment law, the recording of working hours.

   Under a Part concerning "[m]easures to combat precarious work in the working day", Article 10 of Royal Decree-Law 8/2019 alters Article 34 of the Workers' Statute Act('LET') and does so in two manners. Firstly, adding a new sub-article, Article 34(9), which provides how a company must ensure "the daily record of working hours", including indication of the specific start and end times of each worker's working day, without prejudice to flexible working hours also included thereunder. To this end, and by multi- or single-employer collective agreement or, failing that, decision of the employer after consultation with the statutory body of worker representatives within the company, this recording of working hours shall be organised and documented. The records must be kept by the company for four years and must be made available to workers, the statutory body of worker representatives and the Labour and Social Security Inspectorate.

Secondly, rewording Article 34(7) LET, whereby the Government may establish extensions or limitations in the unified regulation and duration of the working day and breaks, "*as well as particularities in the obligations to record working hours, for those sectors, occupations and staff categories that so require due to their peculiarities*".

The justification starts mainly from the socio-labour reality, with the explanatory notes highlighting a series of data extracted from official sources that are certainly a cause for concern. For example, throughout 2018, 35 per cent of the total number of complaints of non-compliance by employers related to working time; or, in the fourth quarter of 2018, more than 50 per cent of employees reported working more than 40 hours a week and a large number of part-time workers indicated that the actual working time did not match the reported working time; or, in short, that every week in 2017 an average of 5.8 million overtime hours per week were worked in our country and, in 2018, overtime grew to 6.4 million hours. Hence, the confessed objective of this amendment is to "*help to correct the precarious, low-wage and poverty situation that affects many of the workers who suffer abuse in their working day*".

2. It seems clear that the amendment has both an immediate and a mediate intention; the immediate one is to create a mechanism that prevents the continuation of some of the abuses in the field of work - in this case, those derived from working hours, especially in part-time work - and the mediate one is to make excessive working hours come to the fore for remuneration purposes - both in overtime and in 'supplementary'(overtime specific to part-time work) hours - but, above all, as an object of collection within the scope of Social Security. Both plausible and praiseworthy pursuits insofar as helping to regularize excesses that disrupt the labour framework.

   Nonetheless, the materialization of this obligation can generate many difficulties for companies, sectors or business activities that organise production with more flexible parameters in a worker's completion of a working day. Practically all companies use working hours tracking mechanisms, although not in all of them with a daily record of workers' working hours, which is required from the entry into force of the piece of legislation under consideration, two months after its publication.

   However, there are important limits to its application:

   — To begin with, a company's own rules on flexible working hours and those enjoyed by its employees. This will sometimes prevent a daily record with the intention pursued by the legislator - the tracking of excessive working hours - because flexibility itself may lead to daily reductions and extensions in accordance with predictions of this flexible conduct of the working day. Therefore, the daily record will not inform much and one will have to resort, among other mechanisms and as the system already provides for, to other systems of mediation such as the annualization of working hours; unless, with this new rule, flexible mechanisms adopted before its coming into force are withdrawn, which would be highly detrimental to companies and manifestly contrary to the pretensions of modernisation, particularly with regard to striking a work-life balance.

— Secondly, the organization and documentation of this obligation does not constitute a unilateral power of the employer, who may only act if there is a scheme set out in a multi- or single-employer collective agreement or, failing that, a decision of the employer after consultation with the statutory body of worker representatives within the company. This makes this type of decision considerably more difficult in business activities or companies that, due to their size (it should be stressed that SMEs and micro-enterprises feature prominently in the Spanish business map), have no collective impact on the adoption of these measures. It might well be considered that, precisely because they are small companies, they can monitor their workers more exhaustively. And they probably will, but lacking the bargained support the rule requires.

— And, finally, as the new rule indicates, the Government will be able to make distinctions in the obligations concerning the recording of working hours, for those sectors, occupations and staff categories that so require due to their peculiarities; a key action in this regard because, in the same way that there are regulations on special working days (RD 1561/1995 of 21 September, BOE 26 September) that allowed - from its most distant legislative precedents - adapting the common rules on working hours to specific needs, the same rule will also be imposed in respect of the recording of working hours. And not because of the desire to avoid the application of the rules on overtime, but because of the difficulty of developing the day itself.

An example of all these difficulties can be found in special labour relations that, though generally reliant on the Workers' Statute Act as suppletory law (including the new article 34(9) LET under discussion), give priority to their particular legal regime. And so, for senior managers, working time will be that laid down in the contractual clauses provided that they do not involve services *"that notoriously exceed those that are customary in the relevant professional sphere"* (Article 7 RD 1382/195 of1 August 1, BOE 12 August); as far as professional sportsmen and sportswomen are concerned, the working day will include "*the actual rendering of their services in front of an audience and the time they are under the direct orders of the club or sports entity for purposes of training or of physical and technical preparation for such*" (Article 9(1) RD 1006/1985 of 26 June, BOE 27 June), whereas *"for the purposes of the maximum duration of the working day, time spent in gatherings prior to the holding of competitions or sports performances, or travelling to the place where such are held, shall not be computed, without prejudice to regulating the treatment and maximum duration of such time spent through collective bargaining"* (Article 9(3) RD 1006/1985); for artists in public shows *"the working day of the artist shall include the actual performance of his artistic activity in front of an audience and the time he or she is under the orders of the Company, for the purposes of rehearsal or recording of performances. In any case, the obligation to carry out unremunerated rehearsals will be excluded"* (Article 8(1) RD 1435/1985 of 1 August, BOE 14 August); more clearly, with persons involved in commercial transactions on behalf of another, *"the employment relationship to which the worker is subject will not mean subjection to a specific working day or time, without prejudice to the provisions contained in collective or individual agreements"* (Article 4(1) RD 1438/1985 of 1 August, BOE 15 August); in the case of specialists in Health Sciences, "*the working time and rest arrangement for residents shall be*

those established within the scope of the respective health services" (Article 5(1) RD 1146/2006 of 6 October, BOE 7 October); and, finally, in respect of lawyers providing services in law firms, *"in any event, the distribution of the working day must be done in such a way as to ensure service to clients and compliance with procedural time limits"* (Article 14(2) RD 1331/2006 of 17 November, BOE 18 November). All of these examples, even if they are not the only ones, that show the above-mentioned difficulty regarding the application of the general rule and foreseeably impracticable in a large part of these cases.

3. The amendment was essential for the foregoing reasons, but perhaps more necessary than a legislative amendment in terms of tracking daily hours so as to know the overtime worked would have been scrutiny of such overtime, especially in part-time work, given that when the Workers' Statute Act allows the annualization of the working day and the computation of (annual) overtime according to this parameter, the daily working time may not be decisive - although logically better to keep a record than not to do so. And this is so because, as is well known, a timetable is not the only element of a working day, characterised in many cases by non-attendance periods, at the employer's discretion, with teleworking, travelling, rotational shift work, training, pre-activity preparation, etc., periods that may or may not count as actual work according to the sector, business activity, company or occupation.

   The statutory and trade union worker representatives and the administrative and judicial authorities constitute an unavoidable guarantee of compliance with employment rules. And they are to remain so as the new formal obligation to record working hours on a daily basis may be fulfilled even if the actual working day is not statutory, collectively bargained or contractually agreed. In this respect, note how the legislator already specified in Article 12(4)(c) LET the obligation of recording part-time workers' working hours "*day by day and totalled monthly, providing the worker with a copy, together with a salary receipt, of the summary of all hours worked in each month, both normal and supplementary",* which has not prevented –but rather, taking into account the data provided in the explanatory notes to the amendment here discussed, increased– abuse in excessive part-time working hours. Hence strictness may be required with those sectors, business activities and types of employment allegedly non-compliant, but flexibility in the application of rules and regulations by those which, without resorting to part-time work and even without needing special or excessive working hours or overtime, require tracking working hours, as has been the case until now, more flexibly and with an annual, not a daily, horizon. As the case law of the Supreme Court has repeatedly pointed out, companies have mechanisms to monitor the obligations of its employees without the need to impose a general record of working hours each day and for each worker. It is part of their organisational freedom and managerial powers.

   The Government has availed itself of this legal doctrine to justify the amendment [*"It is true that de lege ferenda would benefit from a legislative amendment that would clarify the obligation to keep an hourly record and provide the worker with proof of having worked overtime",* Judgment of the Supreme Court of 23 March 2017, Ar. 1174 (FJ 5)], although it should be noted how, in the same pronouncement, the Supreme Court remarks on the difficulty of imposing "*on the company*

the establishment of a complicated time-tracking system, by means of a generic sentence, which will require, necessarily, negotiating with the trade unions the system to be implemented, since it is not simply a matter of recording entries and exits, but the actual working day with multiple variants" (PL 5); all the more if, as the aforementioned judgment warns, *"at the end of the month the company will notify you of the number of overtime hours worked, or not worked, which will allow you to claim against that communication and at the time of proving the overtime worked, you will have in your favour Article 217(6) LEC, a provision that does not allow presuming overtime when a record is not kept, but that plays against those who do not keep it when the worker proves that he or she did work overtime*" (PL 5). A possibility confirmed through the receipt of the monthly salary.

Aside, the Government also uses the Opinion of the Advocate General delivered on 31 January 2019 in Case C-55/18, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, on the obligation for undertakings to set up a system to measure daily working time. It is true that in said Opinion and pending the Court of Justice of the European Union's ruling, the Advocate General considers that "*national legislation which does not impose any obligation upon undertakings to introduce a system to record the daily working time of all employees is inconsistent with European Union law*" (paragraph 89). However, "*it is for the referring court to determine whether it is possible, using the aids to interpretation available under Spanish law, to interpret the Workers' Statute in such a way as to find that it does lay down an obligation for undertakings to introduce a system to measure the daily attendance of full-time workers"* (paragraph 92). Therefore, it will be for the Spanish courts to specify the adaptation of the domestic legislation to Community law.

4. Consequently, an essential and necessary amendment; subordinated to the materialization carried out, if not already specified, in collective bargaining; especially to monitor proven abuse in part-time work; with the flexibility require by the adaptation to the type of company, business activity or work carried out; and respecting the particularities or exceptionality of certain services in employment.